Supreme Court, U.S.
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No. 99-1647

IN THE

Supreme Court of the United States

AMERICAN TARGET ADVERTISING, INC.,
Petitioner

v.

FRANCINE A. GIANI, DIRECTOR,
UTAH DIVISION OF CONSUMER PROTECTION,
Respondent

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

SUPPLEMENTAL BRIEF

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SUPPLEMENTAL BRIEF FOR THE PETITIONER

Pursuant to Supreme Court Rule 15.8, petitioner American Target Advertising, Inc. ("ATA") files this Supplemental Brief.

On or about August 10, 2000, the United States Court of Appeals for the Eleventh Circuit issued a decision in *American Charities for Reasonable Fundraising Regulation et al. v. Pinellas County*, No. 97-02058 (Appendix A, infra). The *Pinellas County* case involved a constitutional challenge similar to the case at bar, with some exceptions, and augments the need for the Court to grant certiorari in the present case. In *Pinellas County*, the plaintiffs were a collection of various professionals and organizations. They sought to overturn the Pinellas County, Florida ordinance that requires registration of consultants who provide various services to nonprofit organizations that mail letters, which include a request for voluntary contributions, to the residents of Pinellas County. The plaintiffs—none of whom are located or conduct business in Pinellas County or Florida—challenged the ordinance under the First Amendment, the Commerce Clause and the due process clause of the Fourteenth Amendment of the United States Constitution. The Pinellas County ordinance (Ordinance No. 93-106, hereinafter, the "Ordinance") is, in certain key respects, similar to the Utah Charitable Solicitations Act (the "Utah Act") which is the subject of ATA's challenge in the present matter. *See*, Pinellas County Code Section 42-266 *et seq.* *See*, Appendix B, infra. Consultants must also obtain yet another license from the State of Florida Department of Agriculture and Consumer Services under the Solicitation of Contributions Act, Chapter 496, Florida Statutes, *prior* to submitting the licensing application to Pinellas County, according to the terms of the licensing application.

The Ordinance, like the Utah Act, requires registration of professional fundraising consultants, but unlike the Utah Act,

the Ordinance does not require such entities to submit a bond. Consultants must pay an annual licensing fee, which ranges from $20 to $120 based on the dollar amount of contributions that the consultant's nonprofit organization clients received in the preceding year. Consultants must file a detailed licensing application, a copy of which is attached in Appendix C, infra. Among the many requirements in the licensing application, consultants must submit the address, telephone number, date of birth and driver license number[1] of various officers and employees of the consulting entity.[2]

The Eleventh Circuit held, without any significant discussion, that the Pinellas County Ordinance is facially constitutional, but remanded the case to further address the as-applied challenge, specifically with regard to the due process challenge. The decision identifies numerous due process problems that the Eleventh Circuit directed the district court to consider on remand. The plaintiffs argued, as ATA has argued in the present matter, that out-of-state consultants that provide out-of-state services to nonprofit organizations in the conduct of the nonprofits' direct mail do not have the minimum contacts to subject the agency to licensing jurisdiction. The strongly worded remand indicates significant due process problems with the Pinellas County ordinance, but the record below needed further development.

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[1] In Virginia, at least, one's driver license number is also one's social security number (unless specifically requested otherwise). To the extent that the Pinellas County mandates the public filing of what are really social security numbers as a condition for the issuance of such license, it appears to violate the Privacy Protection Act, 5 U.S.C. 552(a) note (1977).

[2] It should be noted that in *Talley v. California*, 362 U.S. 60 (1960), the Court struck down an ordinance that prohibited the distribution of handbills that did not state the name and home address of the person who printed, wrote and/or distributed the literature. The decision notes that such disclosures "tend to restrict freedom to distribute information and thereby freedom of expression." *Id.*, at 64.

The holding that such licensing requirements are facially constitutional, however, highlights the need for the Court to grant certiorari in the present case.

ATA has maintained that such licensing laws are unconstitutional on their face. See Dist. Ct. App. 117-126, 278-280. ATA has addressed the legal reasons in detail. See Pet. 7-20. The consequences of the Eleventh Circuit's decision demonstrate the national importance of ATA's case, for it is not just one law in Utah that presents the problem, but the cumulative impact of the other states, counties and cities that have enacted similar laws as well. Unless such laws are declared unconstitutional on their face, consultants are faced with the expensive and burdensome process that the plaintiffs in the *Pinellas County* matter now face.

Consulting agencies like ATA and the plaintiffs in *Pinellas County* are forced not only to go from state to state, but now county to county—and perhaps city to city—to litigate their claims that such licensing laws are unconstitutional as applied to the given set of facts. That task is not merely burdensome: it is impossible as a practical matter. And even if it were possible, valuable First Amendment rights would be lost during the period of litigation under the very real scenario that the licensing jurisdictions could impose restrictions on nonprofit's mailing their letters pending outcome of the litigation. Like Utah, jurisdictions use such licensing laws to place prior restraints, without regard to the time, place or manner of the activity, on nonprofit organizations mailing to the residents of their respective jurisdictions pending issuance of the licenses.

In one sense, the plaintiffs in *Pinellas County* still have an opportunity to have the Ordinance declared unconstitutional. In a larger sense, however, the Eleventh Circuit's decision creates the need for consultants to litigate from county to county, which is perhaps the severest result that could obtain,

not just for consulting agencies, but for the courts as well.[3] Consultants that cannot afford to litigate in every county and state are faced with the option of complying with unconstitutional laws or severely restricting where their nonprofit clients can mail. That is likely to result in nonprofit organization's contracting only with a very limited number of consultants who can afford—both in terms of financing as well as the time needed to complete the extensive registration processes[4]—to register in what was conceivably, but now

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[3] Recently, a Kentucky county charitable solicitation ordinance was challenged in *Public Citizen et al. v. Jefferson County*, No. CV 369 (filed June 26, 2000), United States District Court for the Western District of Kentucky. The Plaintiffs also include Greenpeace and American Charities for Reasonable Fundraising Regulation (which is one of the plaintiffs in the *Pinellas County* case). While the cause of action differs in some respects from the present matter, the litigation involves a challenge to a county ordinance that requires nonprofit organizations to obtain a license before mailing into the county. The State of Kentucky already has its own charitable fundraising licensing law requiring registration, Kentucky Revised Statutes 367.650 *et seq.* The Jefferson County ordinance requires, among other things, that nonprofit organizations list the name, home address, telephone number and social security number of certain employees. The ordinance also requires nonprofit organizations to submit financial reports based on a calendar year, even if such organizations use a fiscal year to prepare their financial statements. The point of ATA's reference to the litigation is to emphasize that not only are there various states, counties and cities in which organizations must bring litigation to challenge the constitutionality of those laws, but those organizations that choose to register face myriad, disparate and burdensome registration and licensing requirements from jurisdiction to jurisdiction. Such multiple, diverse licensing laws, with their conflicting licensing requirements, compound the problems of compliance with these licensing laws for those organizations involved in national nonprofit direct mail campaigns.

[4] It is extremely important for the Court to keep in mind that the registration process is more extensive than merely completing and filing one registration document. As under the Utah Act, presuming the licensing application is accepted on the first attempt, registration laws require updates, including registering each new client when it is obtained, submitting financial reports each year, and re-registering annually.

more realistically, 6,000 jurisdictions in the United States. These surely are results that are unacceptable under the First Amendment, the Commerce Clause and the due process clause of the Fourteenth Amendment.

The pleas by these government entities, such as Pinellas County, that such burdensome laws are needed to protect their residents do not wash. Laws exist or may be enacted that accomplish those goals without the present scenario that will most certainly drive many consultants out of business, and prevent nonprofit organizations from disseminating their very valuable literature.

The *Pinellas County* decision is foreboding and creates even more urgency for the Court to review the constitutionality of charitable licensing laws. ATA respectfully suggests that the *Pinellas County* case emphasizes the need for the Court to grant certiorari in the present matter.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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